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**IN THE FIRST JUDICIAL DISTRICT COURT**  
**IN AND FOR BOX ELDER COUNTY, STATE OF UTAH**

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ROBERT L. MORGAN,	)	PLAINTIFF'S ANSWER AND
STATE ENGINEER,	)	AFFIRMATIVE DEFENSES TO
	)	DEFENDANT'S COUNTERCLAIMS
Plaintiff,	)	
	)	Civil No. 010100466MI
v.	)	
	)	
DAVE SUNDBERG,	)	Judge: Clint S. Judkins
	)	
Defendant.	)	

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Plaintiff/Alleged Counter-Defendant Robert L. Morgan, State Engineer of the State of Utah ("State Engineer"), by and through his counsel, Heather B. Shilton, Assistant Attorney General, hereby answers and asserts its affirmative defenses to Defendant/Counter-plaintiff Dave Sundberg's Counter Complaint in correspondingly numbered paragraphs below:<sup>1</sup>

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<sup>1</sup> Simultaneously herewith, the State Engineer has filed and served a Motion to Strike Affirmative Defenses and to Dismiss Counter Complaint .

1. Plaintiff is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation that in 1995, Defendant acquired the property to which water rights No. 11-788 and 11-789 are appurtenant, and therefore denies the same. Plaintiff admits the remaining allegation insofar that the Utah Clear Creek Water System ("System") was not yet created in 1995 and Vern Kempton was appointed by Clear Creek water users as an informal water commissioner to distribute the water.

2. In reply to paragraphs 2 through 20, Plaintiff incorporates his Motion to Dismiss Counterclaims and Affirmative Defenses, as though fully set forth herein.

Plaintiff denies each and every allegation of Defendant's Counter Complain which is not specifically admitted or otherwise pled to herein.

#### **First Defense**

1. Defendant's Counter Complaint fails to state of cause of action against Plaintiff upon which relief may be granted.

#### **Second Defense**

2. If this action is a petition for *de novo* judicial review of the decision of the State Engineer on the subject of the Application No. 11-1152 (a70221), Memorandum Decision dated October 28, 1998 ("Application"), and the Order of the State Engineer to cease the use of water dated April 10, 2001 ("Order"), that Application and Order are appropriate and proper in all respects, complying with the applicable statutes and administrative rules, and should be affirmed.

### **Third Defense**

3. If this action is a petition for *de novo* judicial review of the decision of the State Engineer on the subject of the Application and Order, it is barred as Defendant failed to file a petition for judicial review of final agency action within 30 days after the order constituting the final agency action was issued, as required by Utah Code Ann. § 63-46b-14(3)(a).

### **Fourth Defense**

4. If this action is a petition for *de novo* judicial review of the decision of the State Engineer on the subject of the Application and Order, this Court is without jurisdiction to adjudicate other claims for relief, which were not properly joined, pursuant to Utah Code Ann. § 63-46b-17 and Rule 19 U.R.C.P.

### **Fifth Defense**

5. If this action is a petition for *de novo* judicial review of the decision of the State Engineer on the subject of the Application and Order, it is barred because Defendant failed to include the information required by Utah Code Ann. § 63-46b-15(2)(a).

### **Sixth Defense**

6. Defendant's asserted cause of action for damages is defective due to his failure to allege compliance with the Utah Governmental Immunity Act, § 63-30-1, *et seq.*

### **Seventh Defense**

7. Defendant's asserted cause of action for damages is barred under Utah Code Ann. §

63-30-3(1) of the Utah Governmental Immunity Act, because Defendant is entitled to immunity and such immunity has not been waived.

**Eighth Defense**

8. If Plaintiff's governmental immunity has been waived, Defendant's cause of action for damages is barred by Utah Code Ann. § 63-30-4(4), for Defendant's failure to join the Utah Division of Water Rights, which is the governmental entity that employed Plaintiff and Mr. Kempton, as a counter-defendant in this action.

**Ninth Defense**

9. Defendant's cause of action for damages is barred by Utah Code Ann. §§ 63-30-4(3)(b) and 63-30-4(4), because Plaintiff did not act or fail to act through fraud or malice.

**Tenth Defense**

10. Defendant's cause of action for damages is barred by following exceptions to waiver of governmental immunity: Utah Code Ann. § 63-30-10(1) because his alleged injuries resulted from a discretionary function; § 63-30-10(2) because his alleged injuries resulted from the deceit of an employee; and § 63-30-10(3) because his alleged injuries resulted from issuance or denial of a permit, license, certificate, approval, order or similar authorization:

**Eleventh Defense**

11. Defendant's cause of action for damages is barred by Utah Code Ann. § 63-30-12, due to his failure to file a notice of claim.

**Twelfth Defense**

12. Defendant's asserted cause of action for damages is barred by Utah Code Ann § 63-30-19, due to his failure to file an undertaking.

**Thirteenth Defense**

13. Defendant's damages, if any, were proximately caused by his fault, which was equal to or greater than the fault of Plaintiff, if any.

**Fourteenth Defense**

14. Pursuant to Utah Code Ann. §78-27-38, Plaintiff is not liable to Defendant for any asserted amount in excess of the proportion of fault attributable to him by Utah Code Ann. § 78-27-39. Plaintiff reserves the right to have the proportions of fault of other persons or entities, including those immune from suit, determined by the fact finder in this action and to join those not immune from the suit as additional defendants.

**Fifteenth Defense**

15. If Defendant intended to allege a cause of action for fraud, it is barred for the following reasons: 1)Defendant failed to plead fraud with particularity, as provided by Rule 9(b), Utah Rules of Civil Procedure; 2)Plaintiff did not defraud the Defendant; 3)Plaintiff did not create fraudulent water distribution records for the Utah Clear Creek Water Systems; 4)Plaintiff did not divert any water from Clear Creek; 5)The alleged distributions delivered and recorded by Mr. Kempton were not false.

**Sixteenth Defense**

16. Defendant's damages, if any, were proximately caused by the negligence of Defendant or others involved in the diversion of water, which was not foreseeable by a reasonably prudent person in Plaintiff's position and as such constitutes an intervening superseding cause. In that situation, Plaintiff's alleged fault would not be a proximate cause of Defendant's damages.

**Seventeenth Defense**

17. To the extent that Defendant failed to mitigate his injuries and damages, recovery is barred.

**Eighteenth Defense**

18. Defendant does not have standing to bring a cause of action against Plaintiff to adjudicate the appropriation and distribution of water between the State of Utah and the State of Idaho. The State of Idaho is the only entity with standing to bring such a cause of action.

**Nineteenth Defense**

19. To the extent that Defendant intends to bring a cause of action against the State of Utah to adjudicate the appropriation and distribution of water between the State of Utah and the State of Idaho, this Court is without jurisdiction as this is a federal question between States.

*Hinderlider v. La Plata River & Cherry Creek Ditch*, 304 U.S. 92 (1938).

**Twentieth Defense**

20. Defendant has failed to join indispensable parties. Defendant makes allegations and

claims damages against La Vern Kempton, LaMont Campbell, and Steven Scoffield, none of which are parties to this action.

**Twenty-First Defense**

21. Defendant's cause of action and claim for damages arising from the Order are not "ripe" insofar as Defendant is not entitled to receive any water until his water commissioner assessment is paid, pursuant to Utah Code Ann. § 73-5-1(3)(ii).

**Twenty-Second Defense**

22. Defendant's cause of action and claim for damages arising from *Jones v. Naf Irrigation Co.*, Case No 92-00014 (Idaho Fifth District Court 1996) are irrelevant. The Idaho district court neither forbids Plaintiff from appointing Mr. Kempton as a Utah water commissioner nor does it have the authority to do so. Plaintiff is the only person with the legislative authority to appoint a Utah water commissioner. Utah Code Ann. § 73-5 *et seq.*

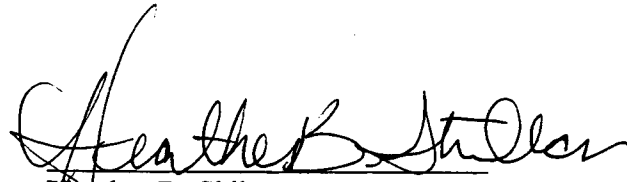
**Wherefore**, Plaintiff prays that Defendant's Counter Complaint be dismissed with prejudice, that the Application and Order be affirmed, and that Plaintiff's Motion to Strike Affirmative Defenses and Dismiss Counterclaims be granted, and for such other or further relief as the Court deems reasonable and just.

**Jury Demand**

Plaintiff demands trial by jury of all damage claims. A jury fee is not required of Defendant.

Dated this 22 day of October, 2001.

MARK SHURTLEFF  
Attorney General

A handwritten signature in black ink, appearing to read "Heather B. Shilton", written over a horizontal line.

Heather B. Shilton  
Assistant Attorney General